Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1976

No. 76-1377

OREGON STATE PENITENTIARY, Corrections Division, Department of Human Resources; PUBLIC EMPLOYE RELATIONS BOARD,

Petitioners,

v.

JERRY HAMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

JAMES A. REDDEN
Attorney General of Oregon
W. MICHAEL GILLETTE
Solicitor General
JOHN W. BURGESS
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: 503/378-4894
Counsel for Petitioners

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No. _____

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Petitioners,

v,

JERRY HAMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on November 18, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon affirming the Public Employe Relations Board's (PERB) decision, which upheld Jerry Hammer's dismissal from public employment at the Oregon State Penitentiary, is reported at 75 Adv Sh 4513, 23 Or App 743, 543 P2d 1094 (1975), and is reprinted as Appendix E hereto. The opinion of the Supreme Court

of the State of Oregon reversing and remanding the decision of the Court of Appeals is reported at 276 Or 651, 556 P2d 1348 (1976), and is reprinted as Appendix A hereto.

JURISDICTION

The decision of the Supreme Court of the State of Oregon (Appendix A) was filed on November 18, 1976. A timely petition for rehearing was denied by the Supreme Court on January 11, 1977 (Appendix B), and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(3). This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

1. A state public employe has a record of chronic absenteeism, and during the course of several months his employer counsels him about his absenteeism, reprimands him about it and warns that if it continues he could be dismissed. The employe's absenteeism continues. The employer then gives him written notice that he is suspended for 10 days and that at the end of the 10-day period his dismissal is to be effective. The notice also contains the facts upon which his dismissal is based. The decision to dismiss could be withdrawn during the 10-day suspension period. The employe then petitions an independent administrative board to review the employer's decision to dismiss him, and the

board finds after a trial-type hearing that the employer had sufficient reason under the law to dismiss him. As a matter of law, has the termination procedure followed by the employer afforded the employe procedural due process under the Fourteenth Amendment?

2. The highest state court finds that the pretermination procedure followed by the employer did not comply with the requirements of procedural due process, but finds no error in the post-termination procedure, whereby an independent administrative review board after a trial-type hearing found that the employer had sufficient reason under the law to dismiss the employe. Under such circumstances, does the Fourteenth Amendment require that the employe be considered still employed and entitled to an award of back wages?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

1. General Background

Prior to the dismissal in question, Mr. Hammer was employed at the Oregon State Penitentiary as a

corrections officer. He was a classified employe under Oregon's State Merit System Law (ORS 240.210) and as such, could only be dismissed "for cause." *See Papadopoulos v. Bd. of Higher Ed.*, 14 Or App 130, 157, 511 P2d 854 (1973).

The penitentiary gave Mr. Hammer written notice in one letter (Appendix F) of his suspension for 10 days and of his dismissal, which was to become effective at the end of the 10-day suspension period. The written notice stated that his dismissal was based upon his "unfitness to render effective service," and the notice set out the facts relied upon by the penitentiary to support its decision.

The written notice was given in accordance with Oregon State Personnel Rule 81-100 which provides:

> "*Notification by Agency* The appointing authority shall notify the employe and the administrator in writing not later than one regular workday after the effective date of any suspension and at least 10 days prior to the effective date of any reduction, demotion, or dismissal. Such notice shall include the grounds for the disciplinary action as provided in ORS 240.555 and the specific charges and facts supporting the statutory charge. With the consent of the administrator, the appointing authority may withdraw, amend, or modify a disciplinary action after written notice has been filed. In instances where the reduction, demotion, or dismissal is amended or modified, the effective date of such disciplinary action must also be amended or modified to meet the ten days' notice requirement." Personnel Rules and Merit System Law (August 1972).

Mr. Hammer appealed his dismissal to the Public Employe Relations Board.* ORS 240.560. PERB is an independent administrative board whose role under the State Merit System Law is to determine after a trial-type hearing whether a disciplinary action taken against an employe complies with the law. *See Fairview Hospital v. Stanton*, 28 Or App 643, 649, —— P2d —— (1977).

After a trial-type hearing, PERB upheld Mr. Hammer's dismissal. He then sought judicial review of PERB's decision by the Oregon Court of Appeals. ORS 240.563. The Oregon Court of Appeals affirmed PERB's decision, and both the penitentiary and Mr. Hammer sought review of the Court of Appeals' decision by the Oregon Supreme Court. The Oregon Supreme Court granted review, and reversed and remanded.

The Oregon Supreme Court's primary analysis of the requirements of procedural due process appears in a companion case, *Tupper v. Fairview Hospital*, 276 Or 657, 556 P2d 1340 (1976) (Appendix D). No petition for certiorari is being sought in *Tupper* because after the Oregon Supreme Court's decision in that case the parties settled the issues.

*The Public Employe Relations Board has been renamed the Employment Relations Board. ORS 240.060.

2. Facts Material to the Questions Presented

The statement of the facts contained in the Oregon Supreme Court's opinion is an adequate summary of the facts.

> ". . . The record indicates that Hammer had a record of diabetes and hypertension as well as a sciatic nerve injury which he had received in Vietnam and which had resulted in a 60 per cent disability adjustment from the Veterans Administration. As a result of these problems, as well as a back injury which he suffered on the job, Hammer was frequently absent from work. While there was no evidence of malingering, PERB found that even excluding the absences due to his work related injury, Hammer was absent 143¾ hours in 1973 and 169 hours in 1974 *in addition to* all regular sick leave. PERB also found that employee absenteeism created serious staffing and scheduling problems at the penitentiary and that Hammer's attendence record was worse than that of any of the other corrections officers.
>
> "On January 14, 1974, after several previous counseling sessions, Hammer received a written reprimand which outlined his absence record and indicated that unless his record improved he would be subject to further disciplinary actions up to and including discharge. When his absences continued, on April 23, 1974, he was again reprimanded and cautioned that he could be subject to further disciplinary action unless his performance improved. On October 21, 1974 he was again counseled about his use of sick time. After Hammer missed five more days in October and November, Hammer was notified on December 3, 1974, that he was suspended for 10 days without pay and then discharged effective December 16, 1974.

> "At Hammer's request, a post-termination hearing was held on January 22 and 23, 1974, before a hearings examiner from PERB, and on June 6, 1975, the Board issued an order upholding Hammer's dismissal. Hammer then sought judicial review of this order in the Court of Appeals."

3. Manner in Which Federal Question was Raised

The federal question was originally raised by Mr. Hammer by motion before PERB:

> "Appellant, Jerry Hammer, moves for an order granting his reinstatement with full back pay for the reason that said appellant's suspension and discharge violated his right to due process of law under the Fourteenth Amendment of the United States Constitution by denying him pre-termination notice of charges, a pre-termination opportunity to appear before the appointing authority, present oral or written arguments, or evidence of affidavits." (PERB Rec, Item 6 at 11).

PERB denied Mr. Hammer's motion:

> "Appellant's motion for an order of the Board granting him reinstatment with full back pay, for the reason that said Appellant's suspension and discharge violated his right to due process of law under the Fourteenth Amendment . . . was properly denied . . . ." (PERB Rec, Item 11 at 45).

The question thus raised was preserved in the review of PERB's decision by the Oregon Court of Appeals. Among the grounds upon which Mr. Hammer sought judicial review was that:

> "(3) petitioner was not accorded a pre-termination notice of charges and a pre-

termination opportunity to appear before the appointing authority and present oral or written evidence or affidavits in violation of his due process rights under the Fourteenth Amendment of the United States Constitution." (PERB Rec, Item 12 at 51-52).

In his brief to the Oregon Court of Appeals, Mr. Hammer assigned as error:

"III. ORS 240.555, ORS 240.560 AND PERSONNEL DIVISION RULE 81-100 ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION FOR FAILURE TO PROVIDE PROCEDURAL DUE PROCESS." (Petitioner's Br at 8).

In its decision the Oregon Court of Appeals found that the Fourteenth Amendment required a pre-termination trial-type hearing, and therefore found that Mr. Hammer had been dismissed without due process. However, the Oregon Court of Appeals further found that due process was ultimately complied with by the post-termination trial-type hearing before PERB.

Both the penitentiary and Mr. Hammer sought review of the Oregon Court of Appeals' decision. The penitentiary sought review on the basis that:

"The Court of Appeals erred in holding . . . that due process requires a pre-termination evidentiary hearing before a member of the state classified service may be discharged. . . ." (Respondent's Pet for Rev at 1).

The Oregon Supreme Court granted review, and reversed the Oregon Court of Appeals' decision. The Oregon Supreme Court held that the pretermination procedure followed by the penitentiary did not comply with the due process requirements of the Fourteenth Amendment of the United States Constitution.

The federal question herein presented has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon Supreme Court has decided a federal question of substance not in accord with the reasoning of this Court.

The recent cases of *Mathews v. Eldridge,* 424 US 319 (1976) and *Arnett v. Kennedy,* 416 US 134 (1974), concerned the extent to which procedural due process imposed constraints on governmental decisions which deprived persons of property interests. This Court found that the structured termination procedures involved in those two cases met the requirements of due process.

The present case, however, involves no elaborate termination procedure. In fact, until the time of giving the written notice of suspension and dismissal the penitentiary adopted a practical, common sense approach in dealing with the behavior of an employe

which was significantly affecting the operation of the institution. Yet, that approach—along with the written notice which set out the facts upor. which dismissal was based and the post-termination trial-type hearing—met the requirements of due process. The present case, therefore, emphasizes the flexible nature of due process referred to in other cases. *See, e.g., Mathews v. Eldridge, supra* at 334.

It was only after the counseling, reprimands and warnings given over a period of several months had failed to stop Mr. Hammer's absenteeism that the penitentiary decided to dismiss him. Even then the penitentiary did not dismiss him outright. The penitentiary gave him the written notice which stated his dismissal would become effective at the end of the 10-day suspension period.

Moreover, that notice of dismissal was not irrevocable. Oregon State Personnel Rule 81-100 contemplates that facts may arise after an employer has given notice of dismissal which may cause the employer to change its decision. The rule permits an employer to

> ". . . withdraw, amend, or modify a disciplinary action after written notice. . . ." Personnel Rules and Merit System Law (August, 1972).

Mr. Hammer thus had 10 days within which to remonstrate with his employer. He chose instead to

cause his union to file an early appeal with PERB. (PERB Rec, Item 4 at 9).

In finding that the pretermination procedure followed by the penitentiary did not comply with procedural due process, the Oregon Supreme Court looked to form rather than substance. The Oregon Supreme Court considered a more structured pretermination procedure like the one upheld in *Arnett v. Kennedy* as the minimum pretermination procedure necessary for due process. *Tupper v. Fairview Hospital, supra* at 664-665. This Court's decision in *Mathews v. Eldridge* indicates that there is no set form to due process. *See, Mathews v. Eldridge, supra* at 334-335.

In *Mathews v. Eldridge, supra* at 335, this Court indicated that

> ". . . the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly, supra,* at 263-271."

The Oregon Supreme Court's opinion does not indicate that the court evaluated the pretermination

procedure followed by the penitentiary in light of the above factors. The court's opinion does not discuss whether there was a risk of mistake through the procedures used by the penitentiary. As a matter of fact, Mr. Hammer's chronic absenteeism was documented by his attendance records. The decision to dismiss Mr. Hammer did not involve issues of witnesses' credibility and veracity as did the decision to dismiss the employe in *Arnett v. Kennedy.* Under such circumstances the additional procedural safeguards proposed by the Oregon Supreme Court would have had little, if any, probable value in minimizing the risk that the penitentiary was mistaken in its decision to dismiss Mr. Hammer.

Moreover, the Oregon Supreme Court's opinion does not discuss the increased fiscal and administrative burdens caused by the addition of the proposed procedural safeguards.

The conflict between the Oregon Supreme Court's reasoning in the present case and this Court's reasoning that due process is flexible in nature merits resolution by this Court.

B. The Oregon Supreme Court has decided a federal question of substance not heretofore determined by this Court.

The Oregon Supreme Court found that the pre-

termination procedure followed by the penitentiary did not comply with due process, but the court found no error in the post-termination procedure, whereby PERB after a trial-type hearing found that the penitentiary had sufficient reason under the law to dismiss Mr. Hammer. As a result of its finding of a violation of procedural due process, the Oregon Supreme Court held that the Fourteenth Amendment dictates that Mr. Hammer is still employed and entitled to an award of back wages for the entire time involved. In other words, the Oregon Supreme Court held that a pretermination procedural error cannot be cured by a post-termination trial-type hearing on the merits. Nothing in any of this Court's cases suggests such an expansive view of the Fourteenth Amendment.

Such an expansion of the Fourteenth Amendment is unwarranted. The reason for procedural due process safeguards during the pretermination period is to minimize the risk of mistake in the decision to terminate so as to protect the employe's interest during the interim period between the decision to terminate and the post-termination hearing where the sufficiency of the grounds to terminate is resolved on the merits. Errors in the pretermination procedure have no effect on the merits of the grounds to terminate. Therefore, once PERB decided after a

trial-type hearing that Mr. Hammer's employment was not erroneously terminated any error in the pretermination was cured. PERB in effect held that the penitentiary had made no mistake in deciding to dismiss Mr. Hammer.

CONCLUSION

The Oregon Supreme Court's decision conflicts with the reasoning of this Court and incorrectly expands the breadth of the Fourteenth Amendment. Accordingly, and for the reasons given above, a writ of certiorari should issue to review the decision of the Oregon Supreme Court.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon

W. MICHAEL GILLETTE
Solicitor General

JOHN W. BURGESS
Assistant Attorney General

Counsel for Petitioners

April, 1977
sd

APPENDICES

Appendix A

No. 247—November 18, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

HAMMER, ***Respondent—Cross-Petitioner,***

v.

OREGON STATE PENITENTIARY et al, ***Petitioners.***

On review from the Court of Appeals.*

Argued and submitted June 7, 1976.

W. Michael Gillette, **Solicitor General, Salem, argued the cause for petitioners. Also on the briefs were Lee Johnson, Attorney General, and John W. Burgess and Al J. Laue, Assistant Attorneys General, Salem.**

Henry H. Drummonds **of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed briefs for respondent/cross-petitioner.**

Reversed and remanded.

HOWELL, J.

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*Review of order of Public Employe Relations Board. 23 Or App 743, 543 P2d 1094 (1975).

HOWELL, J.

This is a review of a decision of the Court of Appeals, 75 Adv Sh 4513, 23 Or App 743, 543 P2d 1094 (1975), which upheld the Public Employe Relations Board's (PERB) decision affirming Hammer's dismissal from public employment at the Oregon State Penitentiary. As in the companion case, *Tupper v. Fairview Hospital and Training Center,* decided today, 276 Or 657, —— P2d —— (1976), the primary issue in this case involves the constitutional adequacy of the pretermination procedures followed by the state in dismissing a classified employee. The Court of Appeals held that the procedures employed violated the due process clause of the fourteenth amendment to the United States Constitution and concluded that Hammer was therefore entitled to an award of back wages for the period subsequent to his dismissal, but prior to the PERB hearing. Both the State Penitentiary and Hammer have petitioned this court for a review of that decision.

Prior to the dismissal in question, Hammer was employed by the Oregon State Penitentiary as a corrections officer. Hammer was hired in January 1972 as a classified employee. The record indicates that Hammer had a record of diabetes and hypertension as well as a sciatic nerve injury which he had received in Vietnam and which had resulted in a 60 per cent disability adjustment from the Veterans Administration. As a result of these problems, as well as a back injury which he suffered on the job, Hammer was frequently absent from work. While there was no evidence of malingering, PERB found that even excluding the absences due to his work related injury, Hammer was absent 143¾ hours in 1973 and 169 hours in 1974 *in addition to* all regular sick leave. PERB also found that employee absenteeism created serious staffing and scheduling problems at the penitentiary and that Hammer's attendance record was worse than that of any of the other corrections officers.

On January 14, 1974, after several previous counseling sessions, Hammer received a written reprimand which outlined his absence record and indicated that unless his record improved he would be subject to further disciplinary actions up to and including discharge. When his absences continued, on April 23, 1974, he was again reprimanded and cautioned that he could be subject to further disciplinary action unless his performance improved. On October 21, 1974 he was again counseled about his use of sick time. After Hammer missed five more days in October and November, Hammer was notified on December 3, 1974, that he was suspended for 10 days without pay and then discharged effective December 16, 1974.

At Hammer's request, a post-termination hearing was held on January 22 and 23, 1974, before a hearings examiner from PERB, and on June 6, 1975, the Board issued an order upholding Hammer's dismissal. Hammer then sought judicial review of this order in the Court of Appeals.

The State Penitentiary contends that the Court of Appeals erred in holding that procedural due process requires a pretermination evidentiary hearing prior to the dismissal of a classified employee. The state argues that a post-termination hearing is sufficient so long as the employee receives notice that certain conduct could subject him to discharge, and he is given some informal opportunity to respond.

This issue is controlled by *Tupper v. Fairview Hospital, supra,* which holds that prior to his dismissal, a classified state employee must be notified of the charges against him as well as the proposed sanction, and he must also be given an opportunity to respond. *See also Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974).

The record indicates that Hammer was repeatedly counseled over a period of several months about excessive abeences and the possible consequences.

However, there is no evidence that Hammer was notified prior to his termination that he was being charged with a continuation of these excessive absences, and that, as a result, the state was considering dismissal. Nor is there any evidence that Hammer was ever provided with an opportunity to rebut these charges and contest the proposed sanction prior to his termination. Therefore, we conclude that the procedures employed by the state in dismissing Hammer were constitutionally inadequate and that his termination on December 16, 1974, was invalid. Consequently, as in *Tupper,* we hold that Hammer is entitled to an award of back wages and other benefits, and that he should continue to receive these amounts until he is properly terminated.[1] In determining these amounts, the Board should offset any compensation and other benefits Hammer has received since his original termination.

The Court of Appeals is directed to order the Public Employe Relations Board to issue an order in conformance with this opinion.

Reversed and remanded.

O'CONNELL, J., specially concurring.

I specially concur for the reasons stated in my separate opinion in *Tupper v. Fairview Hospital,* decided this day.

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[1]There is one remaining legal issue in this case which was not before us in *Tupper.* Hammer contends that even a prolonged history of chronic absenteeism because of medical problems would be insufficient to establish the statutory "unfitness to render effective service," ORS 240.555, unless medical evidence of a continuing disability is also presented. We disagree. If, on remand, Hammer is again terminated, we believe that a finding of continued, persistent and unpredictable absenteeism over a period of several years would be sufficient to support a conclusion that the employee was not fit to render effective service.

Appendix B

OREGON SUPREME COURT

January 11, 1977

TUPPER V. FAIRVIEW HOSPITAL

CA 4449

HAMMER V. OREGON STATE PENITENTIARY

CA 4900

John W. Burgess
Assistant Attorney General

The Supreme Court has today denied respondents' Petitions for Rehearing in the above-entitled cases.

cc—Henry H. Drummonds
Kulongoski, Heid, Durham & Drummonds

STATE COURT
ADMINISTRATOR

By /s/ Marilyn Hartley
Calendar Clerk

Appendix C

STATE OF OREGON

COURT OF APPEALS

JERRY HAMMER,	)	
	)	
Petitioner,	)	JUDGMENT
	)	AND
v.	)	MANDATE
	)	
OREGON STATE	)	JUDICIAL
PENITENTIARY,	)	REVIEW
Corrections Division; Oregon	)	
State Department of Human	)	CA 4900
Resources; PUBLIC EMPLOYE	)	
RELATIONS BOARD,	)	
	)	
Respondents.	)	

This cause having come on to be heard on appeal and the court having found there was not error as alleged, and subsequently the cause having gone to the Supreme Court on petition for review and said court on November 18, 1976, having reversed this court and entered its mandate as attached:

NOW, THEREFORE, IT IS ADJUDGED and ORDERED that the decision entered below is reversed.

IT IS FURTHER ORDERED that petitioner recover from respondents costs and disbursements in the amount of $40 in the Supreme Court.

The cause is remanded for further proceedings

pursuant to law and the decision and opinion of the Supreme Court.

ENTERED at Salem, Oregon NOVEMBER 18, 1976.

ISSUED: JAN. 19, 1977

Appendix D

No. 248—November 18, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

TUPPER, *Respondent—Cross-Petitioner,*
v.
FAIRVIEW HOSPITAL AND TRAINING CENTER et al, *Petitioners.*

On review from the Court of Appeals.*

Argued and submitted June 7, 1976.

W. Michael Gillette, Solicitor General, Salem, argued the cause for petitioners. Also on the briefs were Lee Johnson, Attorney General, Salem, and John W. Burgess, Assistant Attorney General, Salem.

Henry H. Drummonds of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed briefs for respondent/cross-petitioner.

Reversed and remanded.

HOWELL, J.

*Review of order of Public Employe Relations Board. 22 Or App 523, 540 P2d 401 (1975).

HOWELL, J.

This case is before us on review from a decision of the Court of Appeals, 75 Adv Sh 3218, 22 Or App 523, 540 P2d 401 (1975) which upheld the action of the Public Employe Relations Board (PERB) in affirming Tupper's dismissal from public employment by Fairview Hospital and Training Center. The Court of Appeals held that the hospital's pretermination proceedings were constitutionally inadequate, but affirmed Tupper's dismissal on the basis of the post-termination hearing conducted by PERB. The Court of Appeals also held that Tupper was entitled to an award of "lost wages and other benefits" for the time between his dismissal and the post-termination hearing, but refused to grant that relief in this proceeding on the grounds that PERB lacked the legislative authority to make such an award. Both Tupper and Fairview Hospital petitioned this court for review of that decision. We granted these petitions, as well as those in the companion case, *Hammer v. Oregon State Penitentiary,* 75 Adv Sh 4513, 23 Or App 743, 543 P2d 1094 (1975), in order to consider what types of pretermination and post-termination procedures are constitutionally required when a public agency seeks to dismiss a classified employee.

Prior to his dismissal, Tupper had been employed for approximately six years at Fairview Hospital, a state institution for the mentally deficient which is operated by the Mental Health Division of the Department of Human Resources. As a psychiatric aide, Tupper's duties included the supervision and training of the "residents" living in one of several small, dormitory-like "cottages." His responsibilities included preparing and maintaining a "program book" in which the progress made by his residents in various training programs was recorded. The record indicates that these program records were essential to the successful operation and continued funding of these programs.

On April 22, 1974, Tupper's supervisor discovered that Tupper had lost his program book. Tupper agreed to reassemble these records by May 1. When Tupper failed to complete the work by this deadline, he was given until the 24th of May to finish. However, no further progress was made by that date. After four more weeks of remonstrating, Tupper's supervisor sent him a written warning informing him that if the work was not completed by July 10, "this will be considered insubordination and disciplinary action will follow."

When July 10 arrived, Tupper had made additional progress, but some of the records still remained incomplete. On July 15, Tupper was suspended for the day and presented with another memo advising him that "further disciplinary measures" would be taken unless the records were completed by the following day. On July 17, more progress had been made, but the work remained unfinished. Tupper was again suspended for the day and ordered to complete the job by the 18th. However, Tupper's program book remained unchanged on the 18th.

On July 23, 1974, after reviewing Tupper's situation with his supervisors, the director of the psychiatric aide staff recommended a dismissal. The following day, without first notifying Tupper of the contemplated dismissal and affording him an opportunity to be heard, the superintendent of Fairview suspended Tupper without pay and dismissed him effective August 2, 1974. A letter was then sent to Tupper informing him of this action and detailing the facts relied upon in support of the dismissal.

After his dismissal, Tupper sought a hearing before PERB. The hearing was conducted on December 5, 1974, before a hearings examiner. On January 14, 1975, the hearings examiner issued his "Proposed Findings of Fact, Conclusion of Law, and Order," which recommended affirming Tupper's dismissal. Tupper then filed his objections to the proposed order,

and, on March 21, 1975, the board issued a final order which essentially adopted the proposals of the hearings examiner and upheld the dismissal.

Tupper then sought judicial review of this order in the Court of Appeals. While the Court of Appeals concluded that the hospital violated Tupper's rights to procedural due process by failing to notify him of his proposed dismissal and offering him an opportunity to be heard, the court also determined that the subsequent PERB hearing supplied the due process previously lacking and held that Tupper was only entitled to an award of back wages for the period between the date of his dismissal and the date of the hearing.

In its petition for review of that decision, Fairview contends that a pretermination hearing is not constitutionally required in every case and that the post-termination hearing conducted by PERB, together with the repeated encouragements, conferences, demands, warnings, etc., was sufficient to satisfy due process requirements in the present situation. Tupper's petition essentially takes the position that the Court of Appeals was correct in deciding that the hospital violated his due process rights by dismissing him without notice and without an opportunity to be heard, but he contends that the subsequent PERB hearing was not sufficient to remedy this violation. He argues that the PERB hearing is not a de novo proceeding and that a review hearing which accords weight to a procedurally defective initial decision merely perpetuates the original denial of due process. Tupper also argues that even if the Court of Appeals correctly decided that the post-termination hearing was constitutionally adequate, he is then entitled to an award of back pay not merely from August 2, 1974 to December 5, 1974, the date of the hearing, but to March 21, 1975, the date of the board's final decision. Because of our disposition of this case, we will discuss only the first two of these issues.

The fourteenth amendment to the United States

Constitution imposes procedural due process constraints on governmental actions which deprive individuals of significant liberty or property interests. Fairview does not dispute the fact that Tupper had a constitutionally significant "property interest" in his continued employment, and we find that he clearly did. *See* ORS 240.560; *Papadopoulos v. Bd. of Higher Ed.*, 14 Or App 130, 511 P2d 854, S Ct *rev. denied* (1973), *cert. denied* 417 US 919 (1974). *See also Arnett v. Kennedy*, 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974); *Perry v. Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *Board of Regents v. Roth*, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972). *Compare Bishop v. Wood*, —— US ——, 96 S Ct 2074, 48 L Ed2d 684 (1976).

Governmental deprivation of such a property interest must be accompanied by at least minimal procedural protections including some form of notice of the contemplated action and some sort of opportunity to be heard if that action is contested. *Arnett v. Kennedy, supra. See also Mathews v. Eldridge*, —— US ——, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Wolff v. McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974). The particular form of the notice and hearing required, however, will vary from case to case depending upon the particular circumstances and interests involved. *Mathews v. Eldridge, supra; Morrissey v. Brewer*, 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484 (1972); *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 US 886, 81 S Ct 1743, 6 L Ed 2d 1230 (1961).

In this case, the dispute centers upon what process is due prior to the initial dismissal and pending subsequent review. The determination of this issue requires an analysis of several factors. As most recently stated by the United States Supreme Court:

> "* * * identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, supra 96 S Ct at 903.

See also Friendly, *Some Kind of Hearing*, 123 U Pa L Rev 1267, 1278 (1975).

The factors which must be weighed in this case are similar to those considered by the United States Supreme Court in *Arnett v. Kennedy, supra.* In *Arnett* the court sustained the validity of the federal pretermination procedures for dismissing an employee for cause. These procedures included notice of the action contemplated, a copy of the charge, reasonable time for filing a written response and supporting affidavits, and an opportunity for an oral appearance upon request. Then, following the dismissal, a full evidentiary hearing was provided. In upholding this procedural scheme, Justice Powell balanced the interest of the individual employee in continued public employment pending an evidentiary hearing against the government's interest in the expeditious removal of an unsatisfactory employee.[1] Powell noted that the procedures in *Arnett* "minimize[d] the risk of error in the initial removal decision and provide[d] for compensation for the affected employee should that decision eventually prove wrongful." 416 US at 170. He then concluded that a full evidentiary hearing need not be provided prior to the employee's dismissal and that the

[1]Several separate opinions were filed in *Arnett*, none of which commanded the support of a majority of the court at the time. However, both the United States Supreme Court and the lower federal courts have since been following the reasoning of the opinion written by Justice Powell in that case, and we have determined to do so as well. *See, e.g., Mathews v. Eldridge*, —— US ——, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Boehning v. Indiana State Emp. Ass'n, Inc.*, 423 US 6, 96 S Ct. 168, 46 L Ed 2d 148 (1975); *Goss v. Lopez*, 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975); *Frost v. Weinberger*, 515 F2d 57 (2d Cir 1975); *Rolles v. Civil Ser. Comm.*, 512 F2d 1319 (DC Cir 1975); *Eley v. Morris*, 390 F Supp 913 (ND Ga 1975); *Young v. Hutchins*, 383 F Supp 1167 (MD Fla 1974).

procedures employed in *Arnett* provided "a reasonable accommodation of the competing interests." *Id.* at 171.[2]

The corresponding interests of the employee and the government in this case are similar to those in *Arnett*. The scope of the post-termination hearings is also similar. However, in contrast to the rather extensive pretermination procedures existing in *Arnett*, under the termination system utilized in this case virtually no procedural safeguards are employed prior to the actual dismissal. Although Tupper was repeatedly counseled and warned that "further disciplinary measures" might be taken, he apparently was never notified that termination was being considered and was never given an opportunity to defend himself before the officials who decided that he should be dismissed. Due to the absence of these important procedural safeguards, the risk of an erroneous deprivation of the employee's interest in continued employment pending a full evidentiary hearing was substantially greater in this case than it was in *Arnett*.

Moreover, even the relatively extensive pretermination procedures involved in the *Arnett* decision were found to be constitutionally adequate by only a fairly

[2]The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett*, does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the "due course of law" provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pretermination hearing in such cases. This issue was never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state "due course of law" constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. *Compare State v. Childs*, 252 Or 91, 99, 447 P2d 304 (1968) *with Deras v. Meyers*, 272 Or 47, 64 n.17, 535 P2d 541 (1975). *See also Olsen v. State of Oregon*, 276 Or 9, 554 P2d 139 (1976); *Plummer v. Donald M. Drake Co.*, 212 Or 430, 320 P2d 245 (1958).

narrow margin.[3] Therefore, on the basis of *Arnett v. Kennedy, supra*, and in view of the competing interests involved in these cases, we conclude that in addition to his full post-termination hearing Tupper was intitled to the following procedural safeguards prior to his dismissal. First, he should have been notified of the charges against him. Second, he should have been informed of the kinds of sanctions being considered. Third, he should have been given at least an informal opportunity to refute the charges either orally or in writing before someone who was authorized either to make the final decision or to recommend what final decision should be made.[4]

Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974, was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

Reversed and remanded to the Court of Appeals

[3]Four of the nine Justices dissented, at least in part. Marshall, Douglas and Brennan dissented on the grounds that a full evidentiary hearing was required prior to the dismissal. White concurred in part and dissented in part on the grounds that the pretermination procedures involved in that case were adequate only if an impartial hearings officer made the termination decision.

[4]In the interest of avoiding unnecessary controversy, we feel that whenever possible the employee should receive written notice of the charges, of the proposed sanction, and of his right to an informal hearing.

[5]The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 183.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds "[t]he statute, rule or order to be unconstitutional." ORS 183.482(8)(b).

with directions to order the Public Employe Relations Board to issue an order awarding back wages and other benefits until such time as a valid termination has occurred.

O'CONNELL, J., specially concurring.

The pivotal question raised by the state's petition for review and Tupper's cross-petition for review is the validity of the procedures for termination under ORS 240.555, 240.560 and Personnel Rule 81-100, tested by the constitutional requirements of due process. More specifically, the question is whether a pre-termination hearing is required to satisfy due process requirements.[1] Both this case and the companion case, *Hammer v. Oregon State Penitientiary*, decided this day, were briefed and argued solely with reference to the due process clause of the Fourteenth Amendment. Within the framework it seems probable from *Arnett v. Kennedy*, 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974), that a post-termination hearing is sufficient to satisfy the federal requirement of due process, at least if certain safeguards such as notice of the charges and an opportunity to respond precede the dismissal. Neither the petitioner nor respondent have sought to determine whether the Oregon Constitution goes beyond this interpretation of the federal constitution, guaranteeing a greater protection in a procedural way to an employee with entitlement. It is important that this inquiry be made because if there is an applicable provision in our constitution which can be construed as requiring a pre-termination hearing, any discussion of the Fourteenth Amendment and its interpretation in the *Arnett* case is, of course irrelevant.[2]

Since the applicability of the Oregon Constitution

[1] Although the constitutional question might have been avoided by interpreting ORS 240.555 and 240.560 as requiring a pre-termination hearing, Personnel Rule 81-100, adopted pursuant to the authority vested in the Public Employe Relations Board under ORS 240.555(1) to establish termination procedures, provides for a post-termination hearing.

[2] *See*, Linde, *Without "Due Process,"* 49 Or L Rev 125, 133 (1970).

was not raised by counsel, the preliminary question is whether this court can raise it sua sponte. This is not the situation, frequently presented, where a constitutional question is not raised at the trial stage and is raised for the first time by counsel on appeal. In the present case it is assumed that a constitutional question of procedural due process under the federal constitution is properly presented; the question is whether this court should, on its own motion, consider the related question of the applicability of Art. I, § 10 of the Oregon Constitution. Since the matter is of substantial public concern, it is our duty to consider it.[3]

Art. I, § 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

It has been strongly argued by Professor Hans Linde that the guarantees in Art. I, § 10 are not the precise equivalents of the guarantees found in the Fourteenth Amendment.[4] Assuming, without deciding, that this is

[3] Inasmuch as the right to a pre-termination hearing is the principal question involved and since this question of the timing of the hearing would involve a similar policy analysis under both the federal and state constitutions (assuming the latter is applicable), there would be no reason to call for supplemental briefs.

[4] Linde, *Without "Due Process,"* 49 Or L Rev 125 (1970). Professor Linde interprets Art. I, § 10 as a "remedies clause" merely guaranteeing a legal remedy for private wrongs derived from Chapter 40 of the Magna Carta ("To no one will we sell, to no one will we deny, or delay right or justice"), and is not a "due process" clause providing guarantees against official deprivations "except by the law of the land"—clauses derived from Chapter 39 of the Magna Carta ("NO free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). When the Magna Carta was re-issued under Henry III, the two clauses were combined under Chapter 29, which eventually was enacted as a statute by Parliament in 1797. Art. I, § 10 and its predecessors say more than Chapter 40 does, and it is possible that the constitutional draftsmen intended to embody the two ideas expressed in Chapter 29 of Magna Carta. In any event, in the states which have provisions similar to Art. I, § 10 the courts, including this court, have

(Continued on following page)

so, it seems clear that the two constitutional provisions are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the federal and Oregon constitutions without fair procedures generally associated with the term "due process."

In the present case the interest of Tupper is denominated an "entitlement." Comparable interests of public employees have been classified as "property" interests.[5] The inquiry is, therefore, whether the guarantee of Art. I, § 10, of the Oregon Constitution, which prohibits injury to person, property or reputation without due course of law, and guarantees the complete administration of justice, is satisfied by anything short of a pre-termination hearing. In addi-

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(Continued from previous page)

regarded the provisions as the equivalent of the due process clause of the Fourteenth Amendment. *See*, (interpreting Indiana Constitution, Art. I, § 12) *Hale v. State*, 248 Ind 630, 230 NE2d 432, 435 (1967); *Sweet v. State*, 233 Ind 160, 117 NE2d 745, 746-47 (1954); *Hamm v. Review Board of the Indiana Employment Security Div.*, 132 Ind App 318, 177 NE2d 337, 338 (1961); *Freeman v. Pierce*, 179 Ind 445, 101 NE 478, 479 (1913), and (interpreting Ohio Constitution, Art. I, § 16) *Ex Parte Martin*, 139 Ohio St 609, 41 NE2d 702, 706 (1942); *State ex rel Smilack v. Bushong*, 159 Ohio St 259, 111 NE2d 918, 922 (1953), and (Oregon) *State v. Bouse*, 199 Or 676, 686, 264 P2d 800 (1953). *Cf., School Dist. No. 7 v. Weissenfluh*, 236 Or 165, 173, 387 P2d 567 (1963) and *Columbus Packing Co. v. State*, 106 Ohio St 469, 140 NE 376, 378 (1922).

Even if Art. I, § 10 is interpreted as not including a substantive due process provision, it does require procedural due process in the sense of requiring a remedy for injuries to person, property or reputation. If an entitlement is "property", the employee is entitled to a "remedy by due course of law" to retain it. That remedy must be provided by the state. It is for us to say whether it is a remedy "by due course of law" if the employee is given a hearing only after he has been discharged.

[5] *See, e.g., Arnett v. Kennedy*, 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974) (the separate opinions reveal a consensus that such an "entitlement" is a property interest); *Perry v. Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed2d 570 (1972); *Comment*, 10 Harv Civil Rights L Rev 472, 473 (1975). *Cf.*, Reich, *The New Property*, 73 Yale L J 733 (1964).

The recent cases of *Mitchell v. W. T. Grant Co.*, 416 US 600, 94 S Ct 1895, 40 L Ed2d 406 (1974) and *North Georgia Finishing v. Di-Chem.*, 419 US 601, 95 S Ct 719, 42 L Ed2d 751 (1975) have created uncertainty in this area. *See* opinions of Stewart, J. in *Mitchell* and *North Georgia Finishing*. Regardless of the direction finally taken by the U. S. Supreme Court, I believe that plaintiff in the present case has a property interest protected by the justice and remedies clause of the Oregon Constitution.

tion to being a "property" interest, job tenure is also a "reputation" interest. The stigma which an employee suffers upon being discharged from his job, even if only temporarily, can be regarded as an injury to his "reputation," thus qualifying as a protected interest under Art. I, § 10.[6]

Beginning, then, with the recognition of a constitutionally protected interest in the petitioner, the court is faced with the question posed above—is a pre-termination hearing necessary to meet the minimum standards of due process? In answering this question, it must be recognized that the procedural requisites for a due process hearing vary depending upon the importance of the interests involved. On one hand are the interests of the government in expeditiously removing an unsatisfactory employee; on the other hand are the interests of the employee in retaining his job. In the *Arnett* case Justice Powell, in a specially concurring opinion, concluded that the interest of the government as employer outweighed the interest of the employee in balancing the need for a pre-termination hearing. He stated:

> "* * * Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

He added that

> "* * * [A] requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges." 40 L Ed2d at 41.

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[6] Discharge from a government job often seriously injures the employee's business and professional reputation. There is a widely held impression that it is difficult to fire government workers, and this contributes to the belief that anyone fired by the government is probably unemployable. *See*, Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va L Rev 196, 204 (1973); and *Due Process and Public Employment in Perspective: Arbitrary Dismissals of non-Civil Service Employees*, 19 UCLA L Rev 1052, 1065 (1972). Discharge from a job often damages the employee's personal reputation, too, since status in our society is so closely related to an individual's source of livelihood. *See*, Reich, *The New Property*, *supra* note 5.

It is difficult to understand how Mr. Justice Powell could have recited the foregoing as the reasons for his conclusion in the face of the very thorough study of Professor Merrill marshalling facts which point to a contrary conclusion.[7] As to "additional administrative costs," "delay" and the alleged deterrence of warranted discharges, Merrill points out that "The data * * * show that in 1970 agencies that provided hearings in advance generally processed cases faster than those that made a hearing available only on appeal." He adds that "available data clearly do *not* show that conducting the hearing afterwards helps shorten the process."

The contention that the retention of an unsatisfactory employee pending a hearing might be disruptive loses most of its force when it is revealed that the law and regulations existing at the time *Arnett* was decided required that an employee be given at least thirty days' notice of a proposed adverse action so that, as pointed out by Merrill, "agency personnel even now must function for at least a month with the threatened employee in their midst."[8] There is no reason to assume that a hearing could not be scheduled and held within that thirty-day period.[9] There are other data and factors which could be recited to prove that it is not necessary in the interest of office efficiency to postpone the termination hearing.[10] In fact, a pre-termination hearing should *enhance* efficiency by giving the agency an incentive to expedite disposition

[7]The substance of the report is contained in an article entitled *Procedures for Adverse Actions Against Federal Employees, supra* note 6. On the basis of Merrill's report, the Administrative Conference of the United States strongly recommended that evidentiary hearings be held prior to discharge.

[8]Merrill, *supra* 59 Va L Rev at 241.

[9]"[T]here seems little reason why a hearing could not be held during that 30-day period." Marshall, J., dissenting, 416 US at 225.

[10]*E.g., see* Marshall, J.'s dissent in *Arnett;* Merrill, *supra* 59 Va L Rev 196 at 238-246; *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees,* 10 Harv Civil Rights L Rev 472 (1975).

of the matter, allowing it to get on with its primary functions.[11]

The conclusion is, then, that the government as employer has no interests which outweigh those of the employee calling for the postponement of the hearing until after termination has been effected. There being no identifiable governmental interests deserving special protection, the hearing requirements necessary to satisfy due process are the same in preserving the interests of an employee whose job is threatened as they are where an owner's property is sought to be taken or where a person's liberty is at stake.[12]

I am satisfied that due process requires a prior hearing before *property* can be taken.[13] On the same facts, I would regard Art. I, § 10 as requiring the same pre-taking procedure. Since I regard an entitlement as a species of property within the meaning of Art. I, § 10, an employee having such an interest is entitled to have a hearing before that interest is taken from him.

[11]*See,* 59 Va L Rev at 245.

[12]Cf., *Fuentes v. Shevin,* 407 US 67, 92 S Ct 1983, 32 L Ed2d 556 (1972), where it was held that due process requires a prior hearing before property can be taken through the use of state law replevin procedures to repossess chattels; and *Morrissey v. Brewer,* 408 US 471, 92 S Ct 2593, 33 L Ed2d 484 (1972), where it was held that due process requires a prior hearing before a person can be deprived of liberty through state parole revocation.

[13]*See, Fuentes v. Shevin,* 407 US 67, *supra* note 12; *Sniadach v. Family Finance Corp.,* 395 US 337, 89 S Ct 1820, 23 L Ed2d 349 (1969).

Appendix E

No. 514—December 29, 1975

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HAMMER, *Petitioner, v.* OREGON STATE PENITENTIARY ET AL (CA 4900), *Respondents.*

Judicial Review from Public Employe Relations Board.

Argued and submitted November 25, 1975.

Henry H. Drummonds, Eugene, argued the cause for petitioner. With him on the brief were Kulongoski, Heid, Durham & Drummonds, Eugene.

Al J. Laue, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED.

FORT, J.

Petitioner was suspended and dismissed from his position as corrections officer at the Oregon State Penitentiary for chronic and excessive absenteeism on the ground that such conduct constituted "unfitness to render effective service" under ORS 240.555(1). Petitioner appeals from an order of the Public Employe Relations Board (PERB) affirming his dismissal. He was a classified employe under the State Merit System Law, ORS ch 240.

Petitioner claims error because no showing was made that he was unfit to work at the time of his discharge and because the hearing granted him was insufficient to meet the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The evidence at the hearing was that at the time petitioner was hired at the Oregon State Penitentiary in January 1972 he had a sciatic nerve injury from active service in Vietnam. In October 1973 petitioner injured his back while on the job. He also suffered from hypertension.

As a result of his back injury and other health problems petitioner was frequently absent from work in 1973 and 1974. PERB found that while absences due to the on-the-job injury were not cognizable in a discharge proceeding, petitioner was absent 143 3/4 hours in 1973 and 169 hours in 1974 in addition to all his regular sick leave and to time loss caused by his back injury.

PERB also found that absenteeism created a serious problem at the penitentiary. Security positions of necessity had to be filled. Absence on short notice required working officers overtime and disrupting their schedules until a relief person could be located. This created a hardship since a number of corrections officers had been absent frequently. Petitioner's record was worse than that of any of the other security officers.

Penitentiary personnel had notified petitioner both orally and in writing several times that his absence record was a serious problem and that he might be disciplined or discharged if his performance did not improve. He was notified at least five times during 1974 that his attendance record was unsatisfactory, the last time on October 21, 1974. After that date petitioner was absent five days in October and November. On December 3, 1974, petitioner was suspended for ten days without pay and then discharged.

After a hearing held January 22 and 23, 1975, a

report from its hearing examiner, and oral argument, PERB, on June 6, 1975, upheld the dismissal.

The first question before us is whether PERB had evidence before it to conclude that absences averaging over 19 days per year in addition to authorized sick leave here constitute unfitness to render effective service under ORS 240.555(1).

Petitioner claims that after November 4, 1974, his back problem and hypertension were in remission and that he could not be discharged without a medical examination to establish that he was unable to work. At the hearing he produced a cryptic note from his doctor stating that he thought petitioner was medically able to work, but nothing more.

We believe that PERB's findings of fact are supported by substantial evidence in the record.

Petitioner was hired as a full-time employe. His health problems other than those related to his on-the-job injury have had the effect of making him a part-time employe with unpredictable periods of absence. This has resulted in disruption in the manning of security posts at the penitentiary and, upon occasion, hardship on his fellow workers as stated above. The Board found that petitioner was not wilfully absent for reasons other than health. Nonetheless, after considering his two-year history of numerous absences for health reasons we conclude that this record is sufficient to find that he is unfit to render effective service on his responsible job. The employer is not required to obtain a medical examination of its employe.[1]

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[1] For other discharges applying the "unfitness to render effective service" clause along with other clauses of ORS 240.-155(1), *see* James v. Employment Division, 75 Adv Sh 490, 20 Or App 309, 531 P2d 710, Sup Ct *review denied* (1975); Joiner v. Public Emp. Relations Bd., 14 Or App 567, 513 P2d 523, Sup Ct *review denied* (1973); Phillips v. State Bd. of Higher Ed., 7 Or App 588, 490 P2d 1005 (1971), Sup Ct *review denied* (1972).

We find that "unfitness to render effective service" is not unconstitutionally vague as petitioner contends. In *Arnett v. Kennedy*, 416 US 134, 158, 94 S Ct 1633, 40 L Ed 2d 15 (1974), the plurality held that the provision of 5 USC § 7501(a) authorizing removal "for such cause as will promote the efficiency of the service" was not unconstitutionally vague. This court has also held in *Palen v. State Bd. of Higher Education*, 99 Adv Sh 1254, 18 Or App 442, 525 P2d 1047, Sup Ct *review denied* (1974).

Petitioner next challenges the sufficiency of the procedures followed in his discharge, contending that the lack of a full evidentiary hearing *before* discharge violated his due process rights. He also contends that the hearing before the PERB hearings examiner was not a de novo review of the decision to discharge and thus was not sufficient for due process.

We have recently dealt with these issues in *Tupper v. Fairview Hospital*, 75 Adv Sh 3218, 22 Or App ——, 540 P2d 401 (1975), where we held that an employe was constitutionally entitled to a pretermination evidentiary hearing. We also held there that the hearing before a PERB examiner was sufficient to meet due process requirements except that it came too late. We apply that rule here. *See also: Gunsolley v. Bushby*, 99 Adv Sh 3229, 19 Or App 884, 529 P2d 950 (1974).

Affirmed.

Appendix F

CORRECTIONS DIVISION
OREGON STATE PENITENTIARY
DEPARTMENT OF HUMAN RESOURCES
2605 State Street—Salem, Oregon—97310—
Phone 378-2445

December 3, 1974

Mr. Jerry L. Hammer
239 Eldine Street
Salem, Oregon 97301

Dear Mr. Hammer:

Being employed in the Security Section of the Oregon State Penitentiary in the classification of Correctional Officer, you are hereby notified of the following personnel actions:

CLASSIFICATION:	Correctional Officer
PAY RATE:	$715 per month
SECTION:	Security Section, Oregon State Penitentiary.
PERSONNEL ACTIONS:	Suspension from duty without pay for a period of ten (10) work days from Tuesday, December 3, 1974 through Monday, December 16, 1974, including the beginning and ending dates, to be followed by your dismissal from employment as a Correctional Officer at the Oregon State Penitentiary on Tuesday, December 17, 1974.
STATUTORY GROUNDS FOR THE ACTION:	Other unfitness to render effective service as provided by ORS 240.555.
CHARGES AND FACTS SUPPORTIVE OF ACTION:	Records indicate that you were appointed January 17, 1972, as a Correctional Officer. Your attendance record for 1972 indicated a total of 76 hours paid sick leave and 44-½ hours sick leave without pay.

CHARGES AND FACTS SUPPORTIVE OF ACTION (continued):

Attendance records for 1973 indicate a total of 91 hours paid sick leave and 305 hours sick leave without pay.

Attendance records from January 1, 1974, through November 30, 1974, include a total of 67 hours paid sick leave and 335 hours sick leave without pay and other leave without pay.

You have been counseled many times about your continuing absence problems.

On January 14, 1974, you receive a written reprimand in which it was pointed out to you that: "Your employment is not 'part-time' but rather is a full-time position, and your absence whenever and wherever it occurs and for whatever reason hinders the efficient operation of this penitentiary." Further, this written reprimand stated that: "If your absences have been truly due to physical disability, we recommend that you apply for an extended leave of absence without pay in order that you might have sufficient time to get your health in shape to truly to be able to resume full-time duties upon your return."

You did not take advantage of this offer of an extended leave and your absences have continued at an ever-growing rate. You were further told that: "If you decide not to request an extended leave of absence for health reasons, we must assume that your physical condition will allow you to undertake full-time duties; and in the event that your absence record continues in the future as it has in the past, you will be subject to further disciplinary action up to and including discharge."

On September 30, 1974, your Report of Performance Appraisal rated you as a "C" and you were denied a merit salary increase at that time on the basis that: ". . . Mr. Hammer could be a good officer but he appears to have little if any interest in his job. Mr.

Hammer has been counseled several times about the use of sick leave."

On October 23, 1974, you were again counseled by Messrs. Pribble and Keeney about your continued unsatisfactory use of sick leave time.

Your absences during the nearly three years of your employment total 926.5 hours or about 23 weeks or over seven weeks per year. Since January 1, 1974, your absences have been at the rate of more than eight weeks a year. Since the October 23, counseling, you have been absent a total of 40 hours, specifically on October 27, November 4, 24, 25 and 26.

Your undaunted and increasing absences since the January 14, 1974, written reprimand, the performance appraisal of September 30, 1974, and the counseling of October 23, 1974, viewed against the background of your total absence record, give us no choice but to conclude that you are unfit to render effective service.

You have been given every consideration in your employment at this institution; and there are no mitigating circumstances in your case that would cause us to reduce the ten work day suspension and dismissal here ordered.

Please be advised that ORS 240.560 and Personnel Division Rule 81 100 grant you the right to appeal this

Personnel Action to the Public Employe Relations Board within ten days of the effective date of this action. You may wish, if you so choose, to contact the AFSCME Local 2623 for assistance in such appeal.

Very truly yours,
H. C. CUPP,
Superintentent

HCC:nn

APPROVED

R. J. WATSON, Deputy Administrator
for AMOS E. REED, Administrator

cc: Personnel Division
Public Employe Relations Board
Mr. Don Gertenrich, President, AFSCME Local 2623
Mr. W. Hoelscher, Department of Justice
Mr. Phil Senkovich, Chief Personnel Officer, Corrections Division
Personnel File